

Issue – Forestry - Riparian Protections – Action Recommendation

The State of Oregon does not have management measures on forestry lands that adequately protect riparian areas of medium, small and non-fish bearing streams, including intermittent streams, to ensure attainment of water quality standards and full beneficial use support.

Background/Summary

- Since 1998, NOAA/EPA have found that Oregon does not have management measures on forestry lands that adequately protect riparian areas of medium, small and non-fish bearing streams. NOAA/EPA believe more recent studies continue to support this position.
- Oregon Department of Forestry and the Board of Forestry (BOF) also recognize that data from more recent studies show greater protections are needed for these streams, and, as such, have begun a riparian rule review process.
- If successful, the BOF's rule review process will result in greater riparian protections for medium and small fish bearing streams.
- Greater riparian protections for Type "N" streams are not being considered
- Opposition from the Forestry Industry is very strong. Opposition is trying to show that the State's water quality criterion, "Protecting Cold Water" (PCW) is wrong and needs to be changed.

Current Uncertainties

Ex. 5 - Deliberative

Action Options and Recommendation

Ex. 5 - Deliberative

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Staff Recommendation

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Background/Summary

- Since 1998, NOAA/EPA have found that Oregon does not have management measures on forestry lands that adequately protect riparian areas of medium, small and non-fish bearing streams. NOAA/EPA believe more recent studies continue to support this position.
- Oregon Department of Forestry and the Board of Forestry (BOF) also recognize that data from more recent studies show greater protections are needed for these streams, and, as such, have begun a riparian rule review process.
- If successful, the BOF's rule review process will result in greater riparian protections for medium and small fish bearing streams.
- Greater riparian protections for Type "N" streams are not being considered
- Opposition from the Forestry Industry is very strong. Opposition is trying to show that the States's water quality criterion, "Protecting Cold Water" (PCW) is wrong and needs to be changed.

Current Uncertainties

- While ODF and the BOF are conducting a riparian rule analysis process, it is not certain that the BOF will vote for a rule change. Not all BOF members agree that a rule change is needed.
- It is not certain what additional protections would be adopted or where the protections would apply if rules are adopted
- It has been mentioned that the riparian rule process analysis will be done by the end of the year, but there is no certainty this will occur. Past BOF rule adoption processes have taken longer than anticipated.

Action Options and -Recommendation

- Option A – Approve the Forestry-Riparian Protections based on actions ODF and the BOF are taking in its riparian rule revision process
 - Pros
 - Shows support for ODF's and the BOF's efforts to revise existing rules
 - Might resolve the issue of protections for medium and small fish bearing streams
 - Likely supported by industry
 - Cons
 - Would set a precedent by approving a prospective outcome that may not come to fruition
 - Inconsistent with past actions
 - Would require NOAA/EPA to reconsider the record on which the CZARA decision is based. The record closed in March. Information/data generated from the BOF's riparian rule analyses continues to be developed.

- Not sure if the BOF will adopt rule revisions
 - Not sure what the rules will say and where they will be applied
 - Decision would likely be challenged
 - Would be inconsistent with our record since 1998
 - Would not address riparian protections for Type N streams
 - Would reinforce Forestry Industry's effort to show that the PCW is wrong and needs to be changed
- Option B – Remain silent on this issue until the BOF concludes its Riparian Rule Analysis and adopts rule changes
 - Pros
 - We would have certainty on the new protections for M&S streams
 - We would know how and where the protections would be applied
 - Would likely be viewed by some at ODF and BOF as “fair” in our approach in addressing the issue
 - Cons
 - Could take longer than our timeframe for making the final CZARA decision
 - Would not likely include protections for Type N streams
 - Would be considering a broader record than established in the public notice
 - A position to delay a decision based on the State's riparian rule revision process is not supported by OGC
 - This position would likely be challenged by NWEAs
 - Position would be inconsistent with our record thus far
 - Forestry Industry would likely increase its effort to show that PCW is needing to be changed
- Option C – Disapprove the State's CNPCP because its program lacks adequate management measures to provide riparian protection of medium and small fish bearing streams and non-fish bearing streams
 - Pros
 - Consistent with our decision record since 1998
 - Supported by science
 - State recognizes current practices violate PCW
 - Supported by the majority of public comments received
 - Supported by Plaintiff
 - Would not cause a delay in our overall CZARA decision
 - May provide incentive to adopt a rule that adequately addresses all deficiencies including non-fish bearing streams.
 - Cons
 - Decision not supported by the State
 - Will be opposed by the Forestry Industry
 - May discourage progress on rulemaking

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- Option D – Disapprove the State’s CNPCP because its program lacks adequate management measures to provide riparian protection of medium and small fish bearing streams and note deficiency of not failing to address non-fish bearing streams.
 - Pros
 - Supported by science
 - State recognizes current practices violate PCW
 - Supported by the majority of public comments received
 - May be supported by Plaintiff
 - Would not cause a delay in our overall CZARA decision
 - May provide incentive to move forward with the adoption of the rule that addresses all deficiencies medium and small fish bearing streams.
 - Allows flexibility to approve in the future if State addresses medium and small fish bearing streams but fails to address non-fish bearing streams.
 - Cons
 - Not consistent with our decision record since 1998
 - Decision not supported by the State
 - Will be opposed by the Forestry Industry

Staff Recommendation

NOAA/EPA should make a decision that the State’s CNPCP does not contain management measures that adequately protect riparian areas of medium, small and non-fish bearing streams, including intermittent streams.

Note: NOAA/EPA may change the scope of the decision if the BOF establishes rules to provide better protections for M&S fish bearing streams before NOAA/EPA issue its final decision. However, NOAA/EPA will still find that State’s CNPCP does not contain management measures that adequately protect riparian areas of non-fish bearing streams.